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IN THE

Supreme Court of the United States

No. 71 of October Term, 1924.

Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, *Appellants*,

vs.

City of Durham, *Appellee*.

In Error to the Supreme Court of North Carolina.

REPLY BRIEF OF THE APPELLANTS.

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October, 1924.

Press of Byron S. Adams, Washington, D. C.

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The brief of the Defendant in Error has raised but one question to which we deem reply necessary.

The argument for the City of Durham (Appellee's Brief, pp. 12-15) is that the controlling question is one of State law, of interpretation of section 868, North Carolina Consolidated Statutes, which prescribes procedure on mandamus. The State Supreme Court quoted section 868 (Trans., p. 48), as authorizing sum-

mons returnable before the Judge in chambers "at which time the court, except for good cause shown, should hear and determine the action both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court upon the motion of either party to continue the action until the issue of fact can be decided by jury at the next regular term of the court." Mentioning the qualified admissions of two of the railroads of the volume of the traffic over the grade crossing, the State Court correctly decided that no issue of fact was thereby raised, and continued: "Neither did the assertion in the answer that the underpass would be more expensive than a bridge and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable and oppressive. These defenses raised no issues of fact to be tried by jury and the latter was a question of fact for the court." Accordingly, our opponents argue that the State Court has determined, as a State question and beyond possibility of Federal review, that the assertion in the railroad answers of a better and more economical plan for grade separation raises no "issue of fact" with the complaint. Therefore, the argument goes, the railroads having neglected the opportunity to support with proof their side of the "question of fact" have waived their day in court.

This Court will note from the record that the petition of the City alleged a dangerous grade crossing and an ordinance requiring separation in a given method, by underpass. The answer of the railroads attacked the reasonableness of the ordinance by setting up a better and more economical method.

Quoting from the answer of the Southern Railway Company (Trans., p. 23):

> "In thus requiring the construction of an underpass with the proper approaches the ordinance is arbitrary and unreasonable," etc.

This answer and the answer of the other two railroads then proceeds to demonstrate that by an overhead crossing the same result could be best and most economically accomplished. (Trans., pp. 23, 24, 25.) In no other way could the unreasonableness of the ordinance be demonstrated. Only by comparison of methods could reasonableness be tested. By every suggested standard the method of the railroads was alleged to be better. An otherwise proper exercise of police power cannot be successfully attacked by mere showing of expense or operating inconvenience—in this we agree with our opponents. This was the status of the case when the court of first instance, "being of the opinion that no issue of fact for trial by jury is raised upon the pleadings" (Trans., p. 35) found as matter of fact "that said ordinance is valid and reasonable."

There is no dispute in this case over the proper definition of an "issue of fact." The State Supreme Court in this case said (Trans., p. 49):

> "There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressive before it" (reasonableness) "can become an issue of fact for the jury."

This correct statement can be reconciled with the opinion of the State Court that the issue of reasonableness of the ordinance "was a question of fact for the court" only on the theory that the answers of the railroads did not traverse the reasonableness of the ordinance. The effect of the answers as raising issues

on which Federal rights depend is a Federal question. The State statute, section 868, is mandatory that issues of fact be tried by a jury. That court has deprived the railroads of opportunity to maintain their Federal rights by the erroneous opinion that an issue of fact framed in the pleadings is a "question of fact." To quote again the principle stated in Davis v. Wechsler, 263 U. S. 22:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

Respectfully submitted,

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